UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

NABET-CWA, Local 51,

and

Jeremy Brown.

Case Nos. 19-CB-244528
19-CB-247119

CHARGING PARTY'S REPLY BRIEF IN OPPOSITION TO RESPONDENT'S ANSWERING BRIEF

INTRODUCTION

The Answering Brief filed by NABET-CWA, Local 51 ("Union") is more interesting for what it does not say than for what it does. Charging Party Jeremy Brown's ("Brown") exceptions brief noted this case presents a question of first impression for the Board, as the Board has never ruled on the legality of an "evidence preservation letter" in any context (Brown Br. at 6). This dearth of authority is a function of the fact that such letters are not typically used in Board proceedings. The Union's brief does not dispute this proposition. Indeed, the Union cannot cite a single case in which the Board has upheld an evidence preservation letter sent in response to the mere filing of a charge, because such a case does not appear to exist.

Brown's brief also noted the standard for determining whether a communication threatens an employee: whether any reasonable employee would be threatened by the communication. *Tamosiunas v. NLRB***,** 892 F.3d 422, 429 (D.C. Cir. 2018) (recognizing "if any reasonable employee could view the communication as coercive or restraining, the union (or employer) has violated the law."). (Brown Br. at 5). Under Board precedent, a union's communication will be restraining or coercive if "the words could reasonably be construed as coercive," even if that is not the "only reasonable construction." *SEIU, Local 121RN*, 355 NLRB 234, 235 (2010). The Union

here does not dispute that this is the standard, nor does it attempt to propose any separate standard. Instead the Union blithely declares that its letter was not threatening or coercive. Yet the Union's conclusion cannot be squared with the fact that the letters demand preservation of a host of irrelevant documents and threatens *damages* for non-compliance, a result impossible in Board litigation. *See, e.g.*, *HTH Corp. v. NLRB*, 823 F.3d 668, 680 (D.C. Cir. 2016) (refusing to enforce a Board order requiring a party to pay litigation and other costs); *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085 (D.C. Cir. 2016) (same).

For what the Union's brief does say, it largely misses the point. First, the Union spends the bulk of its response contending it has a First Amendment right to send evidence preservation letters. (Union Response Br. 3-7). Second, the Union contends the general duty to preserve evidence in a Board proceeding necessarily trumps an employees' right to be free from restraint and coercion. (Union Response Br. 2-3). Finally, the Union cites a host of inapposite cases concerning the legality of arbitration agreements and employer handbooks. None of these arguments impact the dispositive question here: which is whether the two evidence preservation letters had "a reasonable tendency" to coerce employees in the exercise of their rights under the Act. *Helton v. NLRB*, 656 F.2d 883, 889 (D.C. Cir. 1981). The Board should uphold Brown's and General Counsel Robb's exceptions to the ALJ decision.

I. The Union's evidence preservation letters are not privileged by the First Amendment.

The bulk of the Union's brief claims that its threatening letters are protected by the First Amendment. (Union Br. 3-7). However, if a letter is reasonably construed as a "threat" it is outside the scope of the First Amendment. *NLRB v. Gissel Packing Co.*, 395 U.S. 575, 618 (1969). In *Gissel*, the Court rejected an employer's claim the First Amendment protected its speech. The Court wrote "[A]n employer is free to communicate to his employees any of his general views

about unionism or any his specific views about a particular union, so long as the communications do not contain a 'threat of reprisal or force or promise of benefit." *Id.*; *see also FDRLST Media*, 370 NLRB No. 49 (Nov. 24, 2020) (consistent with *Gissel*). While these cases concerned employer conduct, the Act treats union and employer threats similarly. *Helton v. NLRB*, 656 F.2d 883, 889 (D.C. Cir. 1981) (concluding that any textual differences between the provisions governing employer and union conduct were "not intended to indicate that union conduct should be measured against a less demanding standard than employer conduct"); *see also NLRB v. SEIU, Local 254*, 535 F.2d 1335, 1337-38 (1st Cir. 1976) (applying the "reasonably tend to coerce" test to an allegation of union misconduct); *Tamosiunas*, 892 F.3d at 429. Ergo, as long as the Union's letters are considered threats, they fall outside the ambit of the First Amendment.

The Union also claims it is being "singl[ed] out . . . when any other person could send the same letter" under the First Amendment (Union Br. at 7). Not so. Brown's position is all respondents violate the Act when sending overbroad and threating evidence preservation letters merely in response to a ULP charge. (Brown Br. 6-7). Indeed, the standard for determining whether a communication is an unlawful threat is the same for both unions and employers. *See Teamsters Local 391 (UPS)*, 357 NLRB 2330, 2330 (2012) ("The applicable test, an objective one, is whether a remark can be reasonably interpreted by an employee as a threat, regardless of the actual effect upon the listener") (internal quotation marks omitted); *Waco, Inc.*, 273 NLRB 746, 748 (1984) ("It is too well settled to brook dispute that the test of interference, restraint, and coercion under Section 8(a)(1) of the Act does not depend on an employer's motive nor on the successful effect of the coercion. Rather, the illegality of an employer's conduct is determined by whether the conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights under the Act"); *compare with SEIU, Local 121RN*, 355 NLRB 234, 235 (2010) (a union's

communication will be restraining or coercive if "the words could reasonably be construed as coercive," even if that is not the "only reasonable construction.").

II. The evidence preservation letters are threats.

Before addressing the Union's various claims, it is helpful to remember what is at issue in this case. Here, the Union sent two demand letters intended as an intimidation tactic to retaliate and hound Brown for engaging in protected Section 7 activity and for filing a ULP charge to protect his rights. The Union threatens sanctions and monetary damages for non-compliance. (GC Ex. 13, 14) ("we will not hesitate to seek damages, sanctions, and other remedies under the law."). It requested Brown preserve irrelevant data including "PowerPoint" presentations, "Network access and server log activity," "word processing documents," and other forms of electronically stored information. Moreover, the letters' timing is proof that they were retaliatory responses to the filing of the charges themselves, rather than a good faith tactic used to ensure the preservation of relevant evidence. The first letter was sent a week after the filing and service of the charge and the second was sent a mere three days after the filing of the second charge. Moreover, the sole basis of the second charge was one letter—the first evidence preservation letter—that came from the Union's own counsel. There was no need to send such a broad and threatening letter in response to the specific allegations of the second charge. Any reasonable employee receiving this letter would feel hounded into withdrawing the charges (due to a possible fear of fines or other damages), inherently chilling the NLRB's investigatory process.

The Union raises several claims the letters should not be considered threats. All of these defenses fail under the standards imposed by Board law.

First, the Union claims that the Complaint is "not directed at any particular language in the letters, rather they attack the sending of the letters." (Union Br. 2). Not so. The Complaint

specifically states the letters are unlawful because they are overbroad and threaten damages. (GC Ex. 1(j) ¶ 10(a) & (b)). In addition, the General Counsel's theory of the case is that the letters were overbroad and threatened sanctions that cannot be imposed through the NLRB process. (ALJD at 10-11).

Second, the Union claims that a duty to preserve evidence exists in Board proceedings, so its evidence preservation letters could not be coercive. (Union Br. 2). But, the Board cannot impose monetary sanctions against a party for spoilation and "it is doubtful that the Board has the authority to do so." (ALJD 11) (*citing HTH Corp. v. NLRB*, 823 F.3d 688 (D.C. Cir. 2016) and *Camelot Terrace, Inc. v. NLRB*, 824 F.3d 1085, 1089 (D.C. Cir. 2016) (Board cannot require respondent to pay litigation expenses in ULP proceedings)). Notwithstanding this clear law, the Union's letters specifically threatened an individual employee with damages as a potential sanction for evidence spoilation. The Union cannot be allowed to threaten what it legally cannot seek. *See, e.g.*, *Tamosiunas*, 892 F.3d at 429.

In response, the Union claims that *Epic System Corp. v. Lewis*, 138 S. Ct. 1612 (2018) and *Commerce Club Inc.*, 369 NLRB No. 106 (June 19, 2020) stand for the proposition that "filing lawsuits is not considered protected activity" and because a threat of sanctions "would apply to potential litigation other than before the Board and encompass such litigation it is not a violation of the Act." (Union Br. 8). Neither of these cases mean the Union's letters cannot be construed as an unlawful threat. In *Epic Systems*, the Supreme Court held that agreements containing certain litigation waivers did not violate the NLRA and may be enforced pursuant to another federal statute, the Federal Arbitration Act. In *Commerce Club*, the Board held a confidentiality provision in an arbitration agreement also did not violate the NLRA. Simply put, these cases are completely inapposite and have nothing to do with whether communications to individual employees are

construed as threats.

To the extent the Union claims the letters cannot violate the Act because the threat for damages was aimed at "potential litigation other than before the Board" (Union Br. 8), such a defense is neither factual nor relevant. First, the letters clearly concern an evidence preservation request directly connected to the ULP charges filed by Brown against the Union. Both letters reference the individual NLRB Case Number (GC Ex. 14, 15). Both documents reference "this litigation" or "this action." (GC Ex. 14-15) ("We have reason to believe that relevant information to *this litigation matter* is contained in electronic files . . .") ("Please confirm . . . that you and your client have taken the steps outlined in this letter to preserve ESI and tangible documents potentially relevant to *this action*.") (GC Ex. 14-15) (emphasis added). Moreover, the letter makes no effort to decouple its threat of "damages" from the immediate Board proceedings ("Should you or your client fail to preserve potentially relevant evidence . . . we will not hesitate to seek damages, sanctions, and other remedies under the law.") (GC Ex. 14-15). Any reasonable employee would read these letters and assume they can be sanctioned by the Board for *damages* in connection with their charge. Lastly, any claim that Brown's charges could lead to "more litigation" (Union Br. 8) in some additional forum is particularly fanciful, as there is no evidence in the record that the Union or Brown were contemplating litigation in another forum over this or any other issue. Indeed, the Board can take administrative notice of the fact that only a tiny percentage of its total caseload ever results in federal court subpoena enforcement litigation; and, of those few cases that do, even fewer (if any) result in damage awards. Indeed, when this case went to trial the Union did not even bother to issue any subpoenas to Brown, thus undercutting its claim that the letters were needed to prevent him from spoiling evidence. As the Union well knew, it already had all of the evidence in this *Beck* case in its own files.

Moreover, the point is legally irrelevant because the Board has found discovery requests in other forums can violate the Act. *See Guess?, Inc.*, 339 NLRB 432, 434-35 (2017). Brown raised this argument in his Exceptions Brief and the Union did not respond to this point. (Brown Br. 11-12).

Lastly, the Union claims any questions Brown had about its letters could be directed to his retained counsel. (Union Br. 8, 2). But the fortuity that Brown had a retained attorney cannot be the standard, as many charging parties before the NLRB do not have retained counsel. The test is "whether the words *could* reasonably be construed as coercive" even if that is not the "only reasonable construction." *Pomona Valley Hosp.*, 355 NLRB at 235 (emphasis added). Under this standard, if any reasonable employee could view the communication as coercive or restraining the union has violated the law.

Lastly, as addressed in Brown's Exceptions (Brown Br. 7), the Board must consider the slippery slope if it approves of the Union's evidence preservation letters. Should the Board countenance this type of letter, it will become common for *employers* (as well as cagey unions) to use and abuse such threatening letters to hound employees who are simply trying to assert rights under the Act. Employees, especially those acting *pro se*, receiving these types of letters will feel threatened and wonder if they are in over their head. It does not take much to imagine how widely this will be abused by all respondent parties if sanctioned by the Board.

For example, imagine that after an employee filed a ULP charge, an employer approached him with a similar "form" letter (ALJD 10 n.13) and said: "You must preserve all the relevant documents concerning your charge contained in this letter, and if you do not we will not hesitate to sue you and seek damages from you in any forum we can." Such a communication would ostensibly be legal if the Union wins this case. But, any reasonable employee receiving that

message will feel pressured to withdraw their charges for fear of being unable to comply, or worried that they may be subject to some type of monetary sanctions for making a litigation mistake. The Board's process will be irreparably hijacked because reasonable employees will cease cooperating or withdraw otherwise meritorious charges. Evidence preservation letters have never been a part of Board proceedings, and the Board should not countenance them now.

CONCLUSION

The Charging Party's Exceptions and General Counsel Robb's Exceptions should be granted.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that February 18, 2021, a true and correct copy of the forgoing document was filed electronically using the NLRB e-filing system, and copies were sent to the following parties via e-mail:

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